

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		
12.		

OK

STAT

SUSPENSE

2 MAY 1988

Date

Action Officer:

Remarks:

*Completed per
no objections -
informed OMB
by telecon on
28 Apr 1988*

GAH 4/25/88

Name/Date

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		
12.		

STAT

SUSPENSE

2 MAY 1971

Date

Action Officer:

Remarks:

CAI 4/23/71

Name/Date



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

April 15, 1988

OCA FILE *Leg*

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

Department of State (Bachrach 647-4463)
Department of Defense (Brick 697-1305)
National Security Council
Central Intelligence Agency

25
06

SUBJECT: Justice draft report on H.R. 1153, H.R. 1580, and
H.R. 2443, bills that would prohibit U.S. intelligence
and military cooperation with South Africa.

NOTE: These are being circulated for your information only as we understand
that the HFAC will replace these three bills with a new bill to be
reported from subcommittee within the next few weeks.

The Office of Management and Budget requests the views of your
agency on the above subject before advising on its relationship
to the program of the President, in accordance with OMB Circular
A-19.

A response to this request for your views is needed no later than
MONDAY, MAY 2, 1988.

Questions should be referred to Sue Thau/Annette Rooney
(395-7300), the legislative analyst in this.

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: A.B. Culvahouse
A. Donahue
L. Kaplan

SPECIAL



Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Dante Fascell
Chairman
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1153, H.R. 1580, and H.R. 2443, bills that would prohibit United States intelligence and military cooperation with South Africa.¹ The Department of Justice opposes enactment of these bills because we believe they would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States.

H.R. 2443 and section 6 of both H.R. 1153 and H.R. 1580 impose a blanket prohibition on all cooperation, direct or indirect, between all agencies or entities of the United States government and the armed forces of the government of South Africa, and between all agencies or entities of the United States government involved in intelligence activities and any agency or entity of the government of South Africa.² These bills would thus prohibit all exchange of military or intelligence information, including indirect exchange of information through third parties, and all joint coordination or contingency planning in the military and intelligence fields. In addition, H.R. 2443 specifically prohibits the assigning or detailing of any member of the United States armed forces to serve as or perform the functions of a defense or military attache in South Africa, and further prohibits any cooperation with a defense or military attache at a South African diplomatic mission in the United States.

¹ Our comments are limited to the constitutional issues raised by these bills. We understand that you have received testimony from other departments that addressed the policy implications of the proposed legislation.

² Our constitutional objection to H.R. 1153 and H.R. 1580 is limited in each case to section 6 of the bill, the section prohibiting intelligence or military cooperation with South Africa.

Article II, sec. 3 of the Constitution grants to the President the exclusive power to "receive ambassadors and other public ministers." Pursuant to this power "[t]he President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate relations with them." L. Henkin, *Foreign Affairs and the Constitution* 47 (1972). This power has been recognized by the courts. As Justice Brennan put it, "Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

An important adjunct to the President's exclusive power to institute or terminate diplomatic relations is his exclusive power to conduct those relations. This exclusive power of the President in the conduct of diplomacy has also been recognized by the courts. In Goldwater v. Carter, 617 F. 2d 697 (D.C. Cir. 1979), reversed on other grounds, 444 U.S. 990 (1979), the Court of Appeals for the District of Columbia Circuit stated "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy - a field in which the President, not Congress, has responsibility under our Constitution." 617 F. 2d at 708. The most well-known judicial exposition of this presidential authority is, of course, the case of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). There Justice Sutherland referred to the "delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations" 299 U.S. at 320.

The President's authority to conduct the foreign relations of the United States implies the power to obtain information necessary to that purpose. United States v. Marchetti, 466 F.2d 1309, 1315 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); Bennett v. U.S. Dep't of Defense, 419 F. Supp. 663, 666 (S.D. N.Y. 1976). As Professor Louis Henkin has noted, "The gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's 'eyes and ears' function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies but also through other agents representing the executive, or through military agencies under the President's command. Congress should not interfere with that function." Letter from Louis Henkin to Congressman Louis Stokes, March 31, 1987, reprinted in H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to

² (Cont.) Our objection to H.R. 2443 runs to the entire bill.

the Congress: Hearings Before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence, 100th Cong., 1st sess. 221 (1987).

Besides conferring on the President the power to receive ambassadors and those additional foreign affairs powers inherent in the executive power of the United States, Article II also explicitly establishes the President as commander-in-chief of the armed forces of the United States. In this capacity the President is responsible for the assignment of military personnel and for the training and deployment of the armed forces.

H.R. 1153, H.R. 1580, and H.R. 2443 infringe the President's power to receive ambassadors, his power to conduct foreign relations, and his power to act as commander-in-chief. The prohibition in H.R. 2443 on cooperation with a duly accredited South African defense attache attempts to frustrate the President's exclusive authority to receive ambassadors and recognize foreign governments, while the prohibition on the appointment of a defense attache to South Africa intrudes on the President's authority to designate and dispatch diplomatic agents. Similarly, the prohibition on United States military cooperation with South Africa interferes with the President's authority as commander-in-chief of the armed forces. That authority includes the power to take all necessary steps to prepare the armed forces to fulfill their mission. Those steps may well include joint contingency planning efforts and other routine forms of military cooperation between friendly governments. Finally, the prohibition on cooperation between United States intelligence agencies and the South African government impairs the President's ability to gather information necessary to conduct our foreign relations.

In sum, the Department of Justice believes that the proposed bills interfere with the President's exclusive authority to recognize foreign governments and to determine the nature and extent of our diplomatic relations with them. The bills also hamper the President's power to gather intelligence information and to act as commander-in-chief. Given the magnitude of these constitutional defects, the Department of Justice would be constrained to recommend the President veto this legislation should it be enacted in its present form.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to Congress.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General